# Office of the Attorney General
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MEMORANDUM TO THE MEMBERS OF THE CABINET COUNCIL ON LEGAL POLICY

FROM: William French Smith
Attorney General

In recent months, the Administration has come under attack for an alleged insensitivity to the interests and rights of women. Our critics have charged us with lax enforcement and narrow readings of laws prohibiting sex discrimination; unwillingness to appoint women to significant judicial and executive positions; and failure to follow through on our promises to identify and eliminate gender-based discrimination in federal law.

Although there is room for improvement in almost any aspect of governmental activity, most of this criticism is unjustified. In terms of the enforcement of the laws against sex discrimination, the Administration's record surpasses that of the prior Administration. Moreover, in several cases before the Supreme Court, we have urged a broad reading of the antidiscrimination laws. President Reagan's record on the appointment of women to important Administration posts compares favorably with that of past Administrations. And this Administration has supported a broad range of initiatives -- legislative, regulatory, and administrative -- to eliminate discrimination against women. It is indeed ironic that so many of our achievements have gone unnoticed, while certain unfortunate press exchanges have been magnified into perceived substantive hostility to women's rights.

Some of our critics have attempted to frame public debate on the issue of sex discrimination solely in terms of the Equal Rights Amendment. By claiming that the ERA is the benchmark against which all other antidiscrimination measures must be tested, the Administration's opponents have charged that our opposition to the ERA represents a fundamental antipathy towards all efforts to eliminate sex discrimination. Unfortunately, many now begin their analysis of the Administration's record with the assumption that we oppose women's rights.

The correction of this misperception will not occur overnight. Nevertheless, giving a full account of what the Administration has accomplished in the area of eliminating discrimination against women is an important first step. I am confident that, once our record becomes known, most Americans

will recognize the sincerity of our efforts and the scope of our achievements.

## I. THE ADMINISTRATION RECORD

### A. Enforcement Record of the Department of Justice

The Department of Justice has achieved an exemplary record of enforcement of federal laws prohibiting sex discrimination. The Department has filed 18 cases alleging sex discrimination in employment since January 21, 1981, exceeding the enforcement record compiled by the last Administration during a comparable period. 1/ The Department has also brought suit to prevent denial of credit based on sex or marital status and discrimination against women in educational opportunities. Finally, the Justice Department has vigorously advocated positions on behalf of women's rights in a number of important cases before the Supreme Court.

#### 1. Employment Discrimination

In the employment area, the Department has moved forcefully against public employers who have discriminated on the basis of sex. The Department has filed 18 new lawsuits, and has settled or litigated to a conclusion six employment cases filed during the last Administration. See Tab 1.

The Department filed suit alleging that state police departments in Rhode Island, New Hampshire, Vermont, Massachusetts, Maine, North Little Rock, and New York City discriminated in employment on the basis of sex. In each case, the Department negotiated a consent decree requiring the state to use nondiscriminatory selection criteria and to engage in active efforts to recruit women. The Department obtained similar consent decrees in discrimination suits against the Maryland Transportation Authority, the Clayton County (Ga.) Board of Education, Burlington County (N.J.) College, the Virginia Department of Highways, the Lancaster County (Va.) Sheriff's Office, and the Little Rock (Ark.) police and fire departments. In several of these suits, the Department also obtained back pay awards for the victims of discrimination.

The Department is currently litigating suits against a bank that has a "men only" lunchroom; against the Buffalo Board of Education for violations of the Pregnancy Disability Act; and

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1/ Under this Administration, 21 employment discrimination cases have been filed, 18 of which contained allegations of sex discrimination. During a comparable period of time in the Carter Administration, 17 cases were filed, 16 of which contained allegations of sex discrimination.

against law enforcement authorities in Suffolk County, New York, and Patrick County, Virginia, for sex-discriminatory hiring practices. The Department continues to bring new sex discrimination suits, most recently in a complaint filed August 30, 1983, against the City of Gallup, New Mexico.

In addition, the Department has settled or litigated to a conclusion six cases filed during the last Administration involving sex discrimination. Last year, the Department achieved the largest Title VII recovery against a public employer in the Department's history, obtaining $2.75 million on behalf of 685 women and blacks who were victims of discrimination.

The Department has intervened in Williams v. City of New Orleans, in support of classes of female, Hispanic and white police officers who opposed entry of a consent decree containing a one-to-one promotion quota favoring black officers. The case is under submission to the Fifth Circuit Court of Appeals, sitting en banc. Finally, in the wake of the Supreme Court's holding in Newport News v. EEOC, discussed below, Assistant Attorney General Reynolds has authorized the filing of seven cases alleging discrimination under the Pregnancy Disability Act.

2. Discrimination in the Extension of Credit

The Department has also moved decisively to enforce the protections of the Equal Credit Opportunity Act, attacking discrimination in the extension of credit based on sex or marital status. In this area we have filed two major cases, United States v. AVCO Financial Services, Inc. and United States v. Central State Hospital Credit Union. Two other cases against major credit companies are currently under investigation.

3. Discrimination in Educational Opportunities

The Department has participated in four suits alleging discrimination in provision of educational opportunities.

Two suits have been brought under Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in any educational program receiving federal financial assistance. In Zentgraf and United States v. Texas A&M, a case brought during the Carter Administration but under negotiation in this Administration, we challenged the university's maintenance of a "Corps of Cadets" in which women's activities are severely curtailed on account of sex. Another suit, Pavey and United States v. University of Alaska, was settled by consent decree in October 1981. There we alleged that Title IX precluded the University from discriminating on the basis of sex in athletic programs. The University agreed to maintain equal facilities and to provide for equal financial aid, recruitment, and publicity in its male and female athletic programs.

In an ongoing suit, United States v. Massachusetts Maritime Academy, brought in 1976 during the Ford Administration, we challenged the academy's maintenance of a males-only admissions policy under Title IV of the Civil Rights Act of 1964. As a result of the suit, the academy has opened its admissions to women, but litigation has proceeded regarding the nature of its admissions criteria and recruitment practices. We are awaiting a decision in that case. The Department also intervened in Canterino v. Wilson, a case against the Kentucky Prison System. The court held that prison authorities had unconstitutionally discriminated against women in educational and training programs.

4. Litigation in the Supreme Court

The Department has repeatedly advocated positions in support of women's rights in cases before the Supreme Court. In the 1981 Term, the Administration argued, albeit unsuccessfully, in Ford Motor Co. v. EEOC that an employer's liability for back pay under the sex discrimination provisions of Title VII was not extinguished by an offer of employment which did not compensate for seniority. Last Term in North Haven Board of Education v. Bell, the Department argued successfully that Title IX reaches and prohibits discriminatory employment practices. And in Newport News v. EEOC, another case argued and decided last Term, the Department successfully contended that an employer could not deny pregnancy disability benefits to the spouse of a male worker when other types of disability benefits are extended to spouses. This is a particularly favorable decision for wives of working husbands who do not have disability benefits through their own employment.

The Department has also taken important positions in furtherance of women's rights in amicus curiae briefs in two major cases before the Supreme Court: TIAA-CREF v. Spirt and Hishon v. King & Spaulding. Last Term the Department argued in Spirt that Title VII of the 1964 Civil Rights Act prohibits an employer from providing unequal pension benefits for men and women employees. The Supreme Court adopted our position in a similar case before it, Norris v. Arizona. In an employment discrimination case that will be heard next Term, Hishon v. King & Spaulding, the Department is arguing that Title VII prohibits law firms from refusing to consider women associates for partnership on an equal basis with their male counterparts.

Finally, in Grove City College v. Bell, another case pending in the Supreme Court, the Justice Department has argued that when the federal government provides grants and loans to students attending a college, the college's financial aid program receives "Federal financial assistance" and is subject to the nondiscrimination requirements of Title IX. This is an aggressive argument in a case of first impression before the Supreme Court. Although the Department has been criticized by women's groups for failing to argue that Title IX applies to the entire institution under such circumstances, the language and

legislative history of the statute and the Supreme Court's opinion in the North Haven case all indicate that Congress intended Title IX to be "program-specific."

B. Administration Initiatives

1. Child Support Enforcement

In 1975, the Congress established the Child Support Enforcement Program (CSEP) to foster family responsibility and reduce dependence by families with absent parents on the welfare system. This program was modeled after the highly successful initiative launched in California when President Reagan was governor. The CSEP requires each state to have an approved program of child support enforcement, including measures to establish paternity, locate missing fathers, establish or modify child support orders, and collect court-ordered support payments. The federal government pays much of the cost and provides support services, policy direction, and technical assistance.

The Administration has improved the CSEP in several ways. For instance, the Administration obtained legislation permitting states to make collections for past due child support to AFDC families by having the IRS make offsets to federal tax refunds. $168 million was collected in 1982 through this initiative. The Administration created an interagency working group under the Cabinet Council on Legal Policy which has taken several steps to strengthen federal enforcement assistance, such as providing access to federal records not previously available to locate absent parents. In addition, the Department of Health and Human Services has undertaken several initiatives to strengthen state and local enforcement programs, including providing technical assistance for collections in major urban areas, assisting states in establishing necessary automated systems, and strengthening auditing and informational programs.

The President pledged in his State of the Union Address this year to take further action to promote enforcement of child support laws. In fulfillment of that promise, the Administration recently proposed the "Child Support Enforcement Amendments of 1983." This bill (S. 1691) would require that states adopt several practices that have proven effective in increasing support collections. States would be required to: (1) impose mandatory wage withholding on absent parents more than two months behind in court-ordered child support payments; (2) intercept tax refunds to absent parents who are behind in court-ordered child support; (3) develop procedures to expedite civil hearings on court-ordered child support; and (4) impose fees on nonwelfare parents who use this court-ordered child support collection program.

In addition, the bill would provide financial incentives for states to broaden and improve their child support

enforcement efforts. The federal government currently pays 70% of state administrative costs, and then pays states bonuses based upon their AFDC collections. The Administration's bill would provide for incentives based upon both AFDC and non-AFDC performance. Although the percentage of state administrative costs reimbursed by the federal government would be reduced from 70 to 60 percent, total incentive payments would be increased by about $83 million over what would be available under the present incentive structure. This system will reward states that establish superior performance records in collecting on behalf of both AFDC and non-AFDC families.

Finally, the President sought to focus public attention on the important problem of child support enforcement by declaring August 1983 as "National Child Support Enforcement Month".

2. Child Care

The Economic Recovery Tax Act of 1981 contained several provisions to ease the financial burden of child care. First, the Act substantially increased child care tax credits to working parents. For parents who earn less than $10,000 per year, the credit was increased from $400 to $720 per child. The Act also created an incentive for employers to include prepaid day care in their employee benefit packages, by making employer contributions for child care nontaxable to employees.

Consistent with a promise made by the President in his State of the Union Address, the Administration is also proceeding with several initiatives to encourage better private child care. First, the Women's Bureau of the Department of Labor, in conjunction with the Rockefeller Foundation, is funding four demonstration projects to induce employers to provide day care services for working women. The President's Office on Private Sector Initiatives has sought to create a more informed environment in the business community regarding day care alternatives. The White House-based "50 States Project" seeks to identify unnecessary state and local restrictions that inhibit private child care and to encourage local governments to relax those restrictions. Finally, the Administration has encouraged states to use workfare and work-study programs to provide child care.

3. Tax Reform and Other Economic Initiatives

The Administration has implemented a broad array of tax and economic reforms in an effort to eliminate economic discrimination against women. For instance, the Economic Recovery Tax Act greatly reduced the "marriage tax penalty" applicable to two-earner couples by allowing a partial deduction from married couples' combined salaries. The Act also permitted one-earner couples to contribute more to IRAs than individuals. The reduction of estate tax burdens is also of particular benefit to women, since they outlive men by an average of eight years.

Other reforms have included institution of a sex-neutral definition of poverty to ensure that women are evaluated by the same assistance criteria as are men; enactment of a law permitting state courts to divide military retirement benefits in divorce settlements; and enactment of a law authorizing federal agencies to adopt "flexitime" schedules for their employees on a permanent basis.

4. Social Security Reform

On April 20, 1983, President Reagan signed into law legislation (P.L. 98-21) to improve the long and short-term financial condition of the Social Security system. This reform legislation also contained a host of provisions, summarized below, aimed at eliminating economic discrimination against women.

First, Social Security benefits for widows and divorced women were increased. A major change in eligibility provisions will allow divorced spouses who apply for benefits based on a former spouse's earnings (usually women) to be independently eligible for Social Security benefits at age 62. Under previous law, a dependent divorced spouse could not apply for benefits until her former spouse applied, regardless of age. In addition, benefits previously continued only for surviving spouses who remarried after age 60 were extended to younger disabled widow(er)s and disabled, surviving divorced spouses.

Second, certain sex-based distinctions were eliminated. Many of these distinctions had been voided by court decisions. Illegitimate children are eligible for benefits based on their mother's earnings; under previous law, they were eligible for benefits only on their father's earnings. Two provisions will make benefits based on a wife's earning record equal to those based on a husband's earning record: fathers who have in their care an entitled child under age 16 and aged divorced husbands (as well as aged or disabled divorced surviving husbands) may receive benefits on the same basis as similarly situated wives or ex-wives. Childhood disability benefits will be continued for women who marry as well as for men, and Social Security benefits will be continued to an individual, regardless of sex, who is receiving dependents' or survivors' benefits, whether or not his or her spouse is eligible for such benefits.

5. Welfare and Job Placement Reform

This Administration has acted to eliminate sex-based discrimination in the provision of welfare benefits and in federally-supported work incentive programs. The Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35), signed into law by President Reagan on August 13, 1981, provided that federal Aid for Families with Dependent Children funds would be available to families whose "principal earner" was unemployed. Previously, such aid had only been available to families when the father was

unemployed. On October 13, 1982, the President signed into law amendments to the Job Training Partnership Act (P.L. 97-300), giving job placement preference to "unemployed parents who are the principal earners" of a family. As previously formulated, the Act had given job placement preference to "unemployed fathers." In short, welfare benefit and job placement statutes that discriminated against single-parent families (often headed by women) have been reformed under the Reagan Administration.

6. Initiatives to Assist Crime Victims

The efforts of the Department of Justice to improve the treatment of victims of crime include a number of initiatives designed to remedy problems important to women. For example, in response to the recommendations of the President's Task Force on Victims of Crime, the Department is creating a Family Violence Task Force under the direction of the Attorney General. This group will be commissioned to study the problem of family violence in all its manifestations and to suggest ways in which government can be more effective in protecting women and children from this kind of assault. In addition, the Justice Department and the FBI are initiating joint conferences to improve the investigation and prosecution of sexual assault crimes and the treatment of victims of such crimes.

7. Appointment of Women to High-Level Positions

This Administration is the first in history to appoint a woman to the United States Supreme Court. President Reagan's nomination of Sandra Day O'Connor, in fulfillment of a promise made in his inaugural address, was a critical step towards true equal opportunity in consideration of qualified persons for this nation's highest court. The President has also appointed five women as federal district court judges and one woman to the new United States Claims Court, for a total of seven appointments of women to the federal bench. Four additional women are currently in the process of being nominated to positions on district courts.

President Reagan has also demonstrated his commitment to women's equality and his respect for their ability by appointing more women to full-time top policy making positions during his first two years in office than any of his predecessors during a similar period. By the end of January 1983, he had selected 99 women, compared to only 91 appointed by the previous Administration in its first two years. There are three women in the Reagan cabinet, more than at any other time in U.S. history.

In all, President Reagan has appointed women to more than 1200 important positions in the White House and throughout the executive branch, including 181 to the Senior Executive Service, 584 to Schedule C positions at a level of GS-13 or higher, and over 325 to part-time advisory boards.

In addition to Justice O'Connor, the President's most significant female appointments include United Nations Ambassador Jeanne Kirkpatrick, Transportation Secretary Elizabeth Dole and Health and Human Services Secretary Margaret Heckler. Women also head the Peace Corps (Loret Ruppe), the Consumer Product Safety Commission (Nancy Steorts), the U.S. Postal Rate Commission (Janet Steiger), and the Federal Labor Relations Authority (Barbara Mahone).

C. Task Force on Legal Equity for Women 2/

1. Executive Order 12336

Executive Order 12336 of December 21, 1981 established the Task Force on Legal Equity for Women "to provide for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities." See Tab 2. Section One of the Order provides that the President shall appoint the Task Force members from among nominees of the heads of 21 specified executive agencies, each of which is to have one representative on the Task Force.

Section Two of the Order provides that each Task Force member is responsible for coordinating and facilitating in his or her respective agency, under the direction of the head of the agency, the implementation of changes ordered by the President in sex-discriminatory federal regulations, policies, and practices. The Task Force is charged with making "periodic reports" to the President on the progress made in implementing the President's directives.

In addition, Section Two of the Order directs the Attorney General to complete a review of federal laws, regulations, policies, and practices which contain language that unjustifiably differentiates, or effectively discriminates, on the basis of sex. The Attorney General is directed to report his findings to the President on a quarterly basis through the Cabinet Council on Legal Policy.

2. Progress Report

The recent public criticism of the Task Force derives primarily from a misperception of the Task Force's mandate as set forth in Executive Order 12336. In fact, the Task

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2/ The Task Force is to be distinguished from the "50 States Project" established by the President in 1981. This Project, based within the White House, seeks to encourage governors to identify and correct state laws and regulations that discriminate against women.

Force was intended not to formulate substantive policy initiatives, but to perform the important but limited task of cataloguing sex-biased language in federal laws and regulations so that such sex bias could be eliminated.

On June 28, 1982, the Task Force prepared, and the Attorney General transmitted to the Cabinet Council on Legal Policy, the First Quarterly Report. The report contained: (1) a list of federal statutes reflecting sex bias (based upon a 1976 computer search performed by President Carter's Task Force on Sex Discrimination); (2) a discussion of selected women's issues; and (3) a summary of the progress made by federal departments and agencies in correcting discrimination in laws and regulations under their respective jurisdictions.

The Task Force's Second Quarterly Report, transmitted on December 3, 1982, announced that the Department of Justice had authorized an updated computer-assisted search of the U.S. Code and Code of Federal Regulations and was in the process of coordinating new agency review efforts. These tasks were reported to be "well underway."

The Third Quarterly Report of the Task Force has been transmitted to the CCLP, but has not yet been acted upon. This is the final report on federal statutes containing distinctions based on sex. The listing is the product of the most comprehensive and thorough computer-assisted review of the U.S. Code ever undertaken to identify gender-based distinctions. The report also summarizes the progress made by agencies in reviewing their laws, regulations, policies, and practices for sex-based distinctions.

Part of the work performed by the Task Force to date has been embodied in legislation. On October 1, 1982, Senator Dole introduced a bill to amend the U.S. Code to eliminate some 64 gender-based distinctions, most of which were identified by the First Quarterly Report of the Task Force. President Reagan wrote a letter on September 27, 1982, endorsing Senator Dole's proposal. This bill has been re-introduced in the 98th Congress as S. 501. We understand that the Senate Judiciary Committee's Subcommittee on the Constitution plans to report out S. 501 on September 16.

## II. POSSIBLE ADMINISTRATION INITIATIVES

### A. Amendment of Federal Statutes that Contain Sex-Based Distinctions

As noted above, Senator Dole's bill to eliminate sex-based distinctions in the United States Code (S. 501) is substantially based upon the findings of the First Quarterly Report of the Task Force on Legal Equity for Women. Since S. 501 was introduced, however, the Task Force on Legal Equity for Women

has issued its Third Quarterly Report to the President through the CCLP. This Report identifies 65 additional federal statutes (or related groups of statutes) that contain sex-based distinctions not covered by the Dole bill. See Tab 3. I would propose that the Administration draft an amendment to the Dole bill to amend most -- although not all -- of the additional provisions identified in the Third Quarterly Report. 3/

By far, the majority (47) of these 65 laws are older provisions that define the persons they affect by terms reflecting gender (such as "widows" and "mothers") rather than by sex-neutral terms (such as "surviving spouses" and "parents"). Although many of these laws are obscure and somewhat inconsequential, their continued existence in the United States Code could adversely affect some women. I would recommend that we seek to have all of these laws amended to eliminate references to gender.

The remaining 18 statutory provisions make distinctions among men and women that are more substantive. Eleven of these statutes contain distinctions that are generally intended to favor women, such as the law (29 U.S.C. § 12) requiring that the Director of the Women's Bureau of the Department of Labor be a woman and the statute (36 U.S.C. § 671) that stipulates that at least one of the eight national officers of AMVETS must be a woman. With the exception of two laws that I think should be studied more closely, I would recommend that this group of statutes be amended to eliminate gender-based distinctions. 4/

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3/ The Third Quarterly Report of the Task Force identifies a total of 140 statutes (or related groups of statutes) reflecting sex-based distinctions. 24 of these statutes have already been amended to eliminate the distinctions. Nineteen of these changes occurred under this Administration, and most resulted from legislation we sponsored. Of the 116 remaining statutes containing sex-based distinctions, 51 would be corrected by the current version of the Dole bill.

4/ These two laws are found in Titles 10 and 22 of the United States Code. The first set of statutes (10 U.S.C. §§ 5896-5899) establish separate promotion boards for male and female naval officers. Although the existence of separate promotion boards may indicate discrimination between the sexes, the statutes on their face do not discriminate between men and women in promotions or other personnel practices. Accordingly, it may be impossible without further study to determine what the impact of these statutes has been. A second pair of statutes, 22 U.S.C.

Finally, there are two sets of statutory provisions (seven statutes) of major import that I would recommend against amending at this time. These are statutes that reflect very fundamental and reasoned decisions to distinguish between women and men. One set of provisions establishes prohibitions on the use of women soldiers in combat. A second set of provisions excludes women from the requirement of draft registration. It is possible that Congress, upon further consideration, will decide to reverse itself on these statutes and to change these long-established policies. However, we should not recommend amendment of these laws without a thorough, nationwide debate over the extent to which we want to obliterate all distinctions between the sexes. 5/

B. Legislative Proposals

In several areas relating to women's rights, the Administration has been asked to take a position on pending legislation or has considered introducing legislation of its own. For the most part, these measures are within the jurisdiction of, and have been considered by, the Cabinet Council on Human Resources and the Cabinet Council on Economic Affairs. Within the context of those two groups, I would recommend that the Administration review its position on these proposals and consider the desirability of formulating initiatives or supporting existing bills. The following list is illustrative of these issues, not exhaustive.

1. Sex Bias in Pensions and Insurance

a. Proposals to Prohibit Use of Sex-Based Actuarial Tables in Calculating Pensions

The Administration is committed to the elimination of discrimination against women in pension programs. In his State

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4/ §§ 2151(k) and 2225, generally encourages the integration of women into the national economies of developing nations, and stipulates various actions that the government should take toward this end. While these provisions clearly contain sex-based distinctions, their focus on foreign aid and foreign relations suggests that they, too, be given further study.

5/ I also would recommend against the amendment of 25 U.S.C. § 342 at this time. This statute allows the resettlement of the Southern Ute tribe by a majority vote of the male tribe members. Although this statute clearly is discriminatory on its face, as a matter of the United States' relations with the Southern Ute tribe, it should not be amended until there has been an opportunity to consult with the tribe.

of the Union Address this year, President Reagan stated that the Administration would take action to remedy inequities in pensions. A press release accompanying the address stated that the Administration would "submit legislation to remedy inequities based on sex in employer pension systems."

We have taken a number of steps to implement these goals. Last Term, the Department filed a brief with the Supreme Court in TIAA-CREF v. Spirt arguing that Title VII prohibits the use of sex-segregated actuarial tables to calculate employee retirement benefits. Our position was adopted by the Supreme Court in June in a second, similar case, Arizona v. Norris.

During the past several months, various working groups within the government also have been meeting to discuss possible legislation in the pension area. To a substantial degree, the Supreme Court's decision in Norris has preempted the need for remedial legislation. However, some unresolved questions remain as to how the sex-neutral requirements of Norris are to be implemented. The Administration should consider whether clarifying legislation or regulations might be appropriate, or whether these questions are better left to the courts.

b. Proposals To Prohibit All Sex-Based Insurance Classifications

Several bills have already been introduced in Congress which would prohibit use of sex-based distinctions not only with respect to pensions, but all other forms of insurance as well. These bills would have dramatic practical, legal, and economic ramifications which may be undesirable and, in some respects, disadvantageous to women.

2. Other Pension Equity Issues

Title I of the Economic Equity Act (S. 888) would amend a number of provisions in ERISA and the Internal Revenue Code governing private pension plans and civil retirement plans. Certain provisions for private pension reform would aid "women as workers" -- for example, by lowering the age of participation in pension plans from 25 to 21 and modifying the "break-in-service" rules to give credit for employer-approved maternity or paternity leave. Other provisions would aid "women as spouses" -- for instance, by promoting election and payment of survivor's benefits and by establishing pensions as a legitimate property right. S. 888 would also entitle persons married to civil service employees for at least 10 years the right to a pro rata share of the benefits earned during marriage, and mandate survivor's benefits in the absence of a waiver by the spouse and former spouse. The Retirement Equity Act (S. 19) contains provisions similar to, although not identical to, provisions in Title I of S. 888.

In testimony last month before the Senate Finance Committee, John Chapoton, Assistant Secretary of the Treasury for Tax Policy, stated that the Administration supported "most" of the pension provisions of both bills, but suggested that certain specific changes were necessary to "assure that we aid the maximum number of women and that the administrative burden on pension plans is minimized."

3. Dependent Care

As noted above, the Administration has taken some significant steps to encourage availability of dependent care. Title II of S. 888 contains several further proposals in this area. First, the bill would treat a greater percentage of child care expenditures as necessary business expenses. Second, the bill would make the dependent care tax credit refundable for those whose income is so low that they lack sufficient tax liability to make use of the credit. Third, the bill would clarify that child care facilities fulfilling certain specified criteria qualify for tax-exempt status under §501(c)(3) of the Internal Revenue Code. Finally, the bill would establish a "seed money" assistance program to establish child care information and referral services. The Cabinet Council on Economic Affairs has opposed supporting Title II on the grounds that it would increase the deficit by $.7 billion a year.

4. Social Security Amendments

Several legislative proposals have been introduced in the 98th Congress aimed at further eliminating sex-based discrimination under the Social Security system. These proposals would: (1) establish a working spouse benefit payable in addition to the dependent spouse benefit to recognize the Social Security tax contributions of second earners (H.R. 203); (2) increase from five to ten the number of years of low earnings dropped in computing the covered earnings history for a worker caring for small children at least six months out of the year (H.R. 2741); (3) reduce from ten to five the number of years of marriage that are necessary before a dependent divorced spouse is eligible for benefits on an ex-spouse's earnings record in the case of late-life divorces (H.R. 338); (4) allow disabled widows to receive benefits at any age (H.R. 2743); (5) provide transitional benefits for widowed persons at the age of 50 (a majority are women) to allow them to adjust to the loss of the deceased spouse's income (H.R. 2745); and (6) allow a husband and wife to combine their earnings during marriage for Social Security benefit purposes upon retirement or divorce, and to equalize the benefits payable on retirement, if they have not so elected (H.R. 337, H.R. 2742, and S. 3).

ENFORCEMENT OF LAWS PROHIBITING DISCRIMINATION
IN EMPLOYMENT ON THE BASIS OF SEX

Following is a list of the eighteen cases brought by this Administration alleging sex discrimination in employment:

1. United States v. Rhode Island. Brought in March of 1981, this suit alleges employment discrimination against women by the state police. A consent decree was entered in March 1982 in which the state agreed to employ and promote women on a nondiscriminatory basis and to engage in a vigorous recruitment effort designed to attract women into the pool of applicants as state troopers.

2. United States v. Maryland. This suit was filed in April 1981 and alleged sex discrimination by the state's transportation authority. A consent decree remedying the violation was entered the same month.

3. United States v. New York City. A complaint was filed in July 1981 alleging employment discrimination based on sex, race and national origin by the city police department. A consent decree was entered in November 1981 ordering the city to halt its discriminatory practices and to engage in active efforts to recruit women and minorities into the police force.

4. United States v. New Hampshire. The complaint, filed in September 1981, alleged discrimination against women by the state police department. A consent decree settling the case has been entered.

5. United States v. Vermont. The complaint and consent decree were filed in December 1981. The state police department has agreed to discontinue its sexually discriminatory practices and to engage in active efforts to recruit women as state troopers.

6. United States v. North Little Rock, Arkansas. The case was filed in April 1982, and a consent decree was entered in April 1983 ordering the city to halt its discriminatory practices and to engage in active efforts to recruit both blacks and women. A back pay award of $172,000 was obtained for the individual discriminatees.

7. United States v. Clayton County Board of Education (Georgia). In a complaint filed in May 1982, the Department alleged discrimination based on sex and race in the employment of teachers and principals. The case has been settled, the county agreeing to utilize nondiscriminatory hiring and promotion criteria and to engage in active efforts to recruit women and blacks.

8. United States v. Massachusetts State Police. The case was filed and a consent decree entered in September 1982. The state has agreed to use nondiscriminatory selection criteria and to engage in active efforts to recruit women as state troopers.

9. United States v. Burlington County College (New Jersey). This case was filed in December 1982 and a consent decree entered in January 1983, in which the Department obtained affirmative relief for female faculty members, including back pay totalling almost $300,000. The Department had alleged that the college had discriminated against incumbent female faculty members by paying them lesser wages and failing to promote them on an equal basis with their counterparts.

10. United States v. Whitney National Bank. The complaint, filed in November 1982, alleges discrimination in employment based on sex and race, citing specifically the bank's "men only" lunchroom, limited to white males. The case is still in the discovery stage.

11. United States v. Virginia Department of Highways. The complaint was filed by the United States on behalf of black and women employees and applicants. A consent decree was entered in March 1983 in which the Department of Highways agreed to use nondiscriminatory employment criteria and to engage in active efforts to recruit women and blacks. Individual back pay awards were obtained for the female discriminatees.

12. United States v. Lancaster County Sheriff's Department (Virginia). The case was resolved by consent decree entered in May 1983, in which the sheriff's office agreed to engage in active efforts to recruit women and to hire women as field deputies on a nondiscriminatory basis. Specific affirmative relief was obtained for the individual female complainant.

13. United States v. Buffalo Board of Education (New York). The complaint, filed in April 1983, alleges unlawful discrimination under the Pregnancy Disability Act (1978 Amendments to Title VII). The case is in litigation.

14. United States v. Maine State Police. The complaint was filed and a consent decree entered the same day in this suit in which the Department alleged sex discrimination in the employment of state troopers. The state police agreed to recruit women applicants actively and to hire them as state troopers on a nondiscriminatory basis.

15. United States v. Little Rock, Arkansas. The suit was filed and a consent decree entered in June 1983. The Department had alleged that the police and fire departments had discriminated in the hiring of women and minorities.

16. United States v. Suffolk County, New York. Filed in June 1983, the case is still in litigation. The Department has alleged that the Suffolk County police department has refused to hire or promote women or blacks on account of their sex and race.

17. United States v. Patrick County, Virginia. Filed in June 1983, the case is still in litigation. The Department has alleged that the Patrick County Sheriff's Department has discriminated against women and blacks in public employment.

18. United States v. Gallup, New Mexico. In a complaint filed on August 30, 1983, the Department has alleged that the City of Gallup discriminates in public employment against women and American (Navajo) Indians based upon sex and national origin.

In addition, the Department has either settled or litigated to a conclusion the following six cases alleging sex discrimination in employment filed during the prior Administration:

1. United States v. Buffalo Fire Department -- This case went to trial in March 1983. The Department argued that physical agility tests were not job-related and had a disparate impact on the hiring of women. We are awaiting a decision.

2. United States v. Duquesne Light Co. -- This case was recently settled, and affirmative relief was obtained for blacks and females who had alleged race and sex discrimination in Duquesne Light's hiring practices.

3. United States v. State of Indiana. The Department of Justice obtained a consent decree in May 1983 in which the state agreed to open jobs as guards in the state prisons to women.

4. United States v. Nassau County, New York. A consent decree was obtained in April 1982 in which the county agreed to recruit blacks and females actively and to hire and promote blacks and females without discrimination. Back pay of approximately $1 million was awarded the individual discriminatees.

5. United States v. Nassau County Sheriff's Department. In April 1982 the Sheriff's Department agreed in a consent decree to halt its exclusion of women and to recruit women actively to work as guards in the county jails.

6. United States v. Fairfax County, Virginia. In this case, the Department obtained a record-breaking back pay award for individual victims of the county's employment discrimination. Over two-thirds of the discriminatees awarded relief (459 of 685) were women.

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# Presidential Documents

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## Executive Order 12336 of December 21, 1981

## The Task Force on Legal Equity for Women

By the authority vested in me as President by the Constitution of the United States of America, and in order to provide for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities, it is hereby ordered as follows:

Section 1. *Establishment.* (a) There is established the Task Force on Legal Equity for Women.

(b) The Task Force members shall be appointed by the President from among nominees by the heads of the following Executive agencies, each of which shall have one representative on the Task Force.

(1) Department of State.

(2) Department of The Treasury.

(3) Department of Defense.

(4) Department of Justice.

(5) Department of The Interior.

(6) Department of Agriculture.

(7) Department of Commerce.

(8) Department of Labor.

(9) Department of Health and Human Services.

(10) Department of Housing and Urban Development.

(11) Department of Transportation.

(12) Department of Energy.

(13) Department of Education.

(14) Agency for International Development.

(15) Veterans Administration.

(16) Office of Management and Budget.

(17) International Communication Agency.

(18) Office of Personnel Management.

(19) Environmental Protection Agency.

(20) ACTION.

(21) Small Business Administration.

(c) The President shall designate one of the members to chair the Task Force. Other agencies may be invited to participate in the functions of the Task Force.

Sec. 2. *Functions.* (a) The members of the Task Force shall be responsible for coordinating and facilitating in their respective agencies, under the direction of the head of their agency, the implementation of changes ordered by the President in sex-discriminatory Federal regulations, policies, and practices.

(b) The Task Force shall periodically report to the President on the progress made throughout the Government in implementing the President's directives.

(c) The Attorney General shall complete the review of Federal laws, regulations, policies, and practices which contain language that unjustifiably differentiates, or which effectively discriminates, on the basis of sex. The Attorney General or his designee shall, on a quarterly basis, report his findings to the President through the Cabinet Council on Human Resources.

Sec. 3. *Administration.* (a) The head of each Executive agency shall, to the extent permitted by law, provide the Task Force with such information and advice as the Task Force may identify as being useful to fulfill its functions.

(b) The agency with its representative chairing the Task Force shall, to the extent permitted by law, provide the Task Force with such administrative support as may be necessary for the effective performance of its functions.

(c) The head of each agency represented on the Task Force shall, to the extent permitted by law, furnish its representative such administrative support as is necessary and appropriate.

Sec. 4. *General Provisions.* (a) Section 1-101(h) of Executive Order No. 12250, as amended, is revoked.

(b) Executive Order No. 12135 is revoked.

(c) Section 6 of Executive Order No. 12050, as amended, is revoked.

Ronald Reagan

THE WHITE HOUSE,
*December 21, 1981.*

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Editorial Note: The President's remarks of Dec. 21, 1981, on signing Executive Order 12336, are printed in the Weekly Compilation of Presidential Documents (vol. 17, no. 52).

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The Third Quarterly Report of the Attorney General to the President prepared pursuant to Executive Order No. 12336 identifies 140 statutes that contain sex-based distinctions. Of these statutes, 24 already have been corrected; 64 more would be corrected by a pending bill (S. 501) that Senator Dole has introduced. 1/ However, there remain 65 statutes that contain sex-based distinctions which the Dole bill would not correct.

The sex-based distinctions found in these statutes fall into the following three categories: (1) sex-based distinctions containing references to gender whose amendment the Administration should support; (2) sex-based distinctions that tend to favor women (see text at note 4); and (3) sex-based distinctions that bar women from engaging in certain activities whose amendment the Administration should oppose (see text at note 5).

I. Sex-Based Distinctions Containing References to Gender Whose Amendment the Administration Should Support

33 U.S.C. §857-4 - Commissary privileges extended to widows of members of the National Oceanic and Atmospheric Administration Uniformed Services.

10 U.S.C. §311(a) - Militia consists of "all able-bodied males at least 17 years of age ... and of female citizens of the United States who are commissioned officers of the National Guard."

10 U.S.C. §520 Note, Pub. L. No. 97-252, §403 - Limits the number of males enlisted or inducted into the Army during FY '83, who are not high school graduates to 35% of all males joining that year.

10 U.S.C. §772(c) - Allows retired officers of Army, Air Force, Navy, and Marine Corps to wear retired-grade uniforms, but a retired officer of Navy Nurse Corps may wear her retired-grade uniforms only under conditions prescribed by Secretary of Navy.

10 U.S.C. §1451 - Provides for reductions in monthly annuities for a widow with one dependent child by the lesser of (a) an amount equal to mother's benefit under title II of the Social Security Act, or (b) an amount equal to 40% of the monthly annuity to which entitled.

37 U.S.C. §551 - Includes "wife" and not husband in the definition of dependent of a member of the uniformed service for the purpose of payments to missing persons.

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1/ These 64 statutes include 13 not identified in the Third Quarterly Report.

50 U.S.C App. §§530(1) and 530(4) - Prohibits eviction from house of wife, children, or other dependents of person in military service. A related provision is found at §530(4).

70 Stat. 124 (1980) - Provides for burial in national cemeteries of the remains of commissioned officers of the United States Public Health Service who were detailed for duty with the Army or Navy during World War I, and of the wife, widow, or minor child. Also, at the discretion of the Secretary of the Army, the remains of the wife, widow, or children may be removed from the national cemetery proper to the post section if, upon death, the related officer is not buried in the same or adjoining gravesite.

50 U.S.C. App. §1593 - Separate provisions for retirement grade and pay of members of the Army Nurse Corps and females appointed under §1591.

50 U.S.C. App. §1595 - Computation of length of service of female dietetic and physical therapy personnel.

50 U.S.C. App. §1596 - No uniform allowance for women appointees of Army Nurse Corps; rather a completed issue of uniforms, insignia, etc. will be provided.

50 U.S.C. App. §1597 - Blanket appointment of female officers in Army Nurse Corps and Army Medical Service by President.

50 U.S.C. App. §1598 - Transportation allowances for women appointees in Army Nurse Corps and Army Medical Service.

14 U.S.C. §§372, 373 - Provides that "male citizens in civil life may be enlisted as, and male enlisted members of the Coast Guard with their consent may be designated as, aviation cadets." Although these statutes remain in the United States Code the Coast Guard no longer has aviation cadets.

14 U.S.C. §487 - Provides for procurement and sale of items to Coast Guard officers, enlisted men, and to their widows. (This provision originally applied to certain isolated stations for which the Coast Guard purchased goods for resale. These purchases are no longer made. However, surviving spouses have exchange privileges.)

33 U.S.C. §§773-775 - Provides for benefits to "widows" of Lighthouse Service Personnel. (Lighthouse personnel have been phased out beginning in 1941 and there are presently none. There are no known female lighthouse personnel and therefore no class of "widowers." There are some widows of lighthouse personnel presently receiving benefits under the Act.)

10 U.S.C. §6915 - Provisions for appointment of enlisted members of Naval Reserve and Marine Corps Reserve as student aviation pilots.

10 U.S.C. §6964 - Midshipman sentenced to imprisonment for hazing may not be confined with men convicted of crimes or misdemeanors.

42 U.S.C. §411 - Establishes rules for crediting earnings for persons who are self-employed. In community property states all of the income derived from a trade or business is treated as income of the husband "unless the wife exercises substantially all of the management and control of such trade or business ..." This provision was held to be unconstitutional in Hester v. Harris, 631 F.2d 53 (5th Cir. 1980); Carrasco v. Secretary of Health, Education and Welfare, 628 F.2d 624 (1st Cir. 1980); and Becker v. Harris, 493 F. Supp. 991 (E.D. Cal. 1980). See 20 C.F.R. §404.1086.

42 U.S.C. §413(a) - Defines "quarter of coverage" for purposes of determining insured status. There is a savings provision for people who reached retirement age between Jan. 1, 1955 and July 1, 1957 and had too few quarters of coverage to be eligible because earnings were credited in the quarter in which they were paid instead of when they were earned. Retirement age at that time was 62 for women and 65 for men.

42 U.S.C. §415(f)(5) - Provides for recomputation of benefits for survivors of men who died between age 62 and age 65 using the date of death as the computation point. This provision only applies to men who would have reached age 65 before 1972 because age 62 is the computation point for women and for younger men.

42 U.S.C. §602(a)(19)(G)(iv) - Permits a mother to choose among available child care services, but not to refuse such services. Amended by Pub. L. No. 96-272, 94 Stat. 512 (1980) but discriminatory provisions were not changed.

42 U.S.C. §1307 - Provides penalties for obtaining information from the Social Security system by misrepresentation. Applies to various individuals including divorced wives but does not include divorced husbands.

8 U.S.C. §1432 - A child born outside U.S. of alien parents or an alien parent and a citizen parent who subsequently lost citizenship, automatically becomes a citizen upon naturalization of both parents, or if the child is illegitimate, upon naturalization of the mother providing that other requirements are met.

25 U.S.C. §933(c) - Provides that tribal assets (Catawba tribe) remaining after distribution are to be appraised without including any improvements placed on an assignment by an assignee, or his wife or children.

25 U.S.C. §973(c) - Provides that payment for selections of tribal land (Ponca tribe) for homesite purposes does not include any improvement or repairs made by member, his wife, children, or ancestors.

43 U.S.C. §271 - Provisions contain substantive discrimination and relate to entry on public lands and benefits flowing from such entry.

49 U.S.C. §10722 - Common carriers subject to jurisdiction of the Interstate Commerce Commission may provide free transportation to employee' families: family includes the widow but not the widower of an employee.

42 U.S.C. §1986 - Provides for damages to the "widow" (if none, to the "next of kin") of a deceased person as a result of a wrongful conspiracy in violation of §1985.

30 U.S.C. §934 - Provision utilizing the discriminatory definition of "dependent" and "widow."

33 U.S.C. §909(b) - Under the Longshoremen and Harbor Worker's Compensation Act, death benefits are paid to a widow or widower, (if the deceased has no child), during a widowhood, but only during dependent widowerhood, with two year's compensation, in one sum upon remarriage.

33 U.S.C. §909(c) - Death benefits provided under above Act where there is more than one surviving child of the deceased, but no widow or dependent husband.

33 U.S.C. §909(g) - Compensation provided under Act to nonresident aliens or aliens about to become residents are to be the same as for residents, except for dependents in a foreign country which is provided only to a surviving wife and child or children.

33 U.S.C. §914(j) - Reference to American Experience Table of Mortality and the remarriage tables of the Dutch Royal Insurance Institution for the probability of remarriage of the surviving wife.

45 U.S.C. §231a(c)(4) - Entitles a divorced wife, but not a divorced husband, to an annuity.

26 U.S.C. §1402(a)(5)(A) - Provides that for purpose of defining net earnings from self-employment in community property jurisdictions, all gross income and deductions attributable to a trade or business shall be treated as gross income and deductions of the husband unless the wife exercises substantially all of the management and control of such trade or business, in which case all such gross income and deductions shall be treated as the gross income and deduction of the wife.

18 U.S.C. §2421 - Prohibits transportation across state lines, of any woman or girl, for the purpose of prostitution, debauchery, or other immoral purposes.

18 U.S.C. §2422 - Prohibits coercion or enticement of any woman or girl to cross state lines for purposes of prostitution, debauchery, or other immoral purposes.

18 U.S.C. §3056 - Refers to the President of the United States, his wife, his widow and "until her remarriage."

5 U.S.C. §5561 - Dependent of an employee of an Executive agency or military department is defined to include a wife but not a husband.

12 U.S.C. §1715m(g) - When a serviceman (who has been issued a housing certificate) dies while on active duty in armed forces of U.S., Coast Guard, or National Oceanic and Atmospheric Administration, leaving a surviving widow as owner of the property, the period of ownership is extended for 2 years from date of death or date the widow disposes of the property, whichever is first.

15 U.S.C. §1052(c) - Provides that no trademark may be registered if it includes the name, signature, or portrait of a deceased President of the U.S. during the lifetime of his widow unless she provides written consent.

24 U.S.C. §165 - Pensions of male inmates of St. Elizabeth's Hospital to be used for the benefit of the pensioner and in the case of a male pensioner, his wife, minor children, and dependent parents, or if a female pensioner, for the benefit of her minor children.

24 U.S.C. §191 - St. Elizabeth's Hospital may admit insane persons including men who were insame while in military service, and become insane again after discharge.

28 U.S.C. §604 - Although the Judicial Survivors Annuities Reform Act and Pub. L. No. 96-504 extended payment of annuities from "widows" to "widows and widowers," the duties listed for the Director of the Administrative Office of the United States courts were not expanded to include the payment of annuities to widowers.

42 U.S.C. §1652 - Provides for benefits to dependents of aliens and non-nationals which include a surviving spouse residing in the United states, but if the surviving spouse is residing outside the United States, only a female surviving spouse is entitled to benefits.

48 U.S.C. §§1413, 1415, 1418 - Provides for the protection of rights of the widows of discoverers of guano islands.

48 U.S.C. §1461 - No polygamist, bigamist, or person cohabiting with more than one woman, and no woman cohabiting with any person just described is eligible to vote or hold office in any

United States territory or other place over which the United States has exclusive jurisdiction.

II. Sex-Based Distinctions that Tend to Favor Women

A. Statutes that Should be Amended Immediately

10 U.S.C. §2102 as amended by Pub. L. No. 95-485, title VIII, §809, 92 Stat. 1623 - Military colleges allowing women to enroll must provide the opportunity, but may not require participation in military training.

10 U.S.C. §8848 - Different years for men and women for separation of officers or transfers to retired reserve.

10 U.S.C. §6403 - Separate statute determining how Secretary of Navy can eliminate Naval Reserve and Marine Corps Reserve women officers from active status. [Note: Technical Amendments made, but not cured by Pub. L. No. 96-513, §503(49)(A)-(D) (1980).]

29 U.S.C. §12 - President must appoint a woman as Director of Women's Bureau, Department of Labor.

36 U.S.C. §671 - Requires that one of the eight national officers of AMVETs be a woman.

B. Statutes that Require Further Study

10 U.S.C. §5896 - Reserve officers to be recommended for promotion - separate subsections for eligible women. [Note: Amended but not cured by Pub. L. No. 96-513, §503(34) (1980).]

10 U.S.C. §5897 - Certification of reports by selection boards for promotion of reserve officers. Separate treatment of women and men.

10 U.S.C. §5898 - Submission of selection board reports to President for approval. Separate treatment of women officers.

10 U.S.C. §5899 - Promotion zones for reserve officers. Separate provisions for women.

22 U.S.C. §2151(k) - Requires that the Foreign Relations Assistance Act be administered to give particular attention to programs that tend to integrate women into the national economies of developing countries. Requires that up to $10,000,000 each fiscal year be used to encourage the participation of integration of women in the development process by supporting activities that increase their productivity and income earning capacity. It does not authorize a separate development assistance program for women.

22 U.S.C. §2225 - Requests the President to instruct U.S. representatives to international organizations to carry out their duties, so as "to encourage and promote the integration of women into the national economies of member and recipient countries and into professional and policymaking positions of such organizations." The President is also requested to take into account the progress or lack thereof by such organizations in furthering the above goals in making U.S. contributions to these organizations.

III. Sex-Based Distinctions that Bar Women from Engaging in Certain Activities Whose Amendment the Administration Should Oppose

25 U.S.C. §342 - Permits removal of Southern Utes to new reservation with consent of the majority of the adult male tribal members.

10 U.S.C. §8549 - Female members of the Air Force may not be assigned to aircraft engaged in combat missions.

10 U.S.C. §6015 - Women not to be assigned to combat duty nor to vessels other than hospital and transport ships. Amended by Pub. L. No. 95-485, § 808 to provide:

> "... [W]omen may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions."

50 U.S.C. App. §453 - Male citizens must register for draft. See Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding constitutionality of all male registration for draft).

50 U.S.C. App. §455 - Men selected for training and service.

50 U.S.C. App. §456 - Deferments relating to men.

50 U.S.C. App. § 466 - Men in definition.